

No. 10988

United States
Circuit Court of Appeals
For the Ninth Circuit

DETWEILER BROS., INC., a Corporation,
Appellant,

vs.

L. METCALFE WALLING, Administrator of the
Wage and Hour Division, United States
Department of Labor, Appellee.

Petition for Rehearing

Upon Appeal from the District Court of the United States
for the District of Idaho
Southern Division

HON. CHASE A. CLARK, District Judge

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....., Clerk

PAUL P. O'BRIEN,
CLERK

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PETITION FOR REHEARING

TO THE HONORABLE UNITED STATES CIR-
CIPIT COURT OF APPEALS FOR THE NINTH
DISTRICT:

Appellant herein respectfully petitions the Court
that a rehearing be granted in this matter.

As grounds therefore Appellant states:

I.

The Supreme Court in the case of Oklahoma Press Publishing Company v. Walling, 66 Supreme Court 494, confirmed the general power of the Administrator to make investigations for violations of the Fair Labor Standards Act and confirmed the authority and jurisdiction of the Federal Courts to order the production of records in proper cases in aid of such investigations by the Administrator. The *procedures* by which the powers and authority of the Administrator and the courts are to be exercised, however, were not fully set out by the Supreme Court in that decision; and Appellant submits that such procedures have not been adequately considered by this court in its opinion heretofore filed in this matter.

II.

In its opinion heretofore filed in this case, this court stated:

“All of the materials whose production is
required by the order of the District Court ap-

pear to be relevant to the inquiry of whether or not the Fair Labor Standards Act has been violated." (Opinion, Page 3).

It is respectfully submitted that the test of relevancy in this case is not as to whether the materials whose production is required are relevant to a violation of *any* of the provisions of the Fair Labor Standards Act, but rather whether such materials are relevant to the violations which the Administrator has purported to tell the court that he proposes to investigate.

III.

In this case, the Administrator attempted to represent to the lower court that he was conducting an investigation to determine whether Appellant had violated certain specified Sections of the Fair Labor Standards Act. This court affirmed the order for production of records, however, not because such records were found relevant to what the Administrator might be investigating but because they were found to be relevant to a different and broader investigation, namely, an investigation as to whether the appellant had violated any provisions of the Act.

IV.

As pointed out in Appellant's supplemental brief, the Administrator's application is hopelessly ambiguous as to what the scope of his investigation purports to be. Now, it is submitted, the opinion of the court puts a premium on ambiguity by affirming the order of the lower court on a theory not

justified by the pleadings in this case. Such a result is inconsistent with accepted rules of practice and procedure and seems to be particularly unwarranted in a case of this kind where appellant's constitutional rights of privacy should be limited only to the extent clearly required by the public interest.

V.

Appellant fully appreciates that the appeal here is not from the subpoena of the Administrator but from the order of the lower court. This case is, however, clearly distinguishable from the case *Hagen v. Porter*, CCA 9th, 156 Federal 2nd 362. In that case, the order of the United States District Court *restricted* the terms of an administrative subpoena. In this case, the court has in effect *broadened* the scope of an inquiry sought to be made by the Administrator; and Appellant earnestly contends that an order can no more be reviewed on appeal without reference to the application for the order than can a judgment in a civil case be reviewed on appeal without reference to the plaintiff's complaint.

Respectfully Submitted,

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